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Recommended Citation
Leslie Crocker, Limitations upon the Remedy of "Strict Tort" Liability for the Manufacture and Sale of Goods--Has the Citadel Been Devastated?, 17 W. Rsrv. L. Rev. 300 (1965)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol17/iss1/10

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Limitations Upon the Remedy of "Strict Tort" Liability for the Manufacture and Sale of Goods—Has the "Citadel" Been Devastated?

Since 1960, there has been a revolutionary development in the area of products liability—the recognition of strict tort liability as a remedy for the manufacture and sale of defective goods. This article will attempt first, to define existing limitations upon the remedy of strict tort liability by an analysis of recent, leading decisions and second, to discuss whether any limitations should be imposed upon the remedy in the future. A brief glance at the history of products liability is essential to an understanding of this rapidly changing area.¹

I. THE PRIVITY REQUIREMENT AND THE FIRST ATTACK

Warranty is a curious hybrid, “born of the illicit intercourse of tort and contract, unique in the law.”² Liability for this most “notable example of legal miscegenation”³ was originally based on tort with the first case employing the contract theory appearing in 1778.⁴ Thereafter, warranty, express or implied, gradually came to be regarded as based upon a contract of sale. The proper remedy was therefore considered to be an action in contract.⁵

The confusion which now exists in the area of products liability probably received its greatest impetus in 1842 when Lord Abinger predicted that there would be “the most absurd and outrageous consequences, to which I can see no limit,”⁶ should a party to a contract be held liable for its breach to anyone except the other party.⁷ Thus, the notorious creature, “privity of contract,” was born. Under this


² PROSSER, TORTS § 95, at 651 (3d ed. 1964)

³ Id. at 651 n.85.

⁴ Id. at 651.

⁵ Ibid.


⁷ Prosser, supra note 1, at 1100.
doctrine a contracting party owed no responsibility to a third person with whom he had made no contract, that is, with whom he was not in privity. This nineteenth century view, however, failed to consider the possibility of a duty owed by one party to another aside from the contract.\(^8\) The existence of a contract with one party would not necessarily negative the responsibility of the contracting party for the injuries of another person. Unfortunately, Lord Abinger's words were construed to mean that there could be no action, in either tort or contract, by one not in privity.\(^9\)

This general rule, that a contracting party had no liability to one with whom he was not in privity, continued into the twentieth century.\(^10\) However, even before that time the courts began developing certain exceptions which diminished the effect of the privity doctrine. First, if a seller knew a product was dangerous and neglected to inform the buyer of this fact, he could be held liable to a third person injured by such use.\(^11\) Second, a seller was held liable when a product was used on the seller's premises, the user being treated as an invitee.\(^12\) Finally, the seller was held liable to a third party for injuries caused by a product "imminently" or "inherently" dangerous to human life or safety.\(^13\)

What was meant by an inherently dangerous product was not clearly defined until 1916 in *MacPherson v. Buick Motor Co.*,\(^14\) when Judge Cardozo greatly extended the class of inherently dangerous articles by stating that, "if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."\(^15\) While the *MacPherson* rule extended only to the ultimate purchaser, the scope of

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\(^8\) *Prosser, op. cit. supra* note 2, at 658.


\(^10\) *Id.* at 658-59.

\(^11\) *Id.* at 659-60.

\(^12\) *Id.* at 660.

\(^13\) *Ibid.*

\(^14\) 217 N.Y. 382, 111 N.E. 1050 (1916). There a maker of an automobile with a defective wheel was held liable for negligence to a purchaser who was not in privity of contract.

\(^15\) *Id.* at 389, 111 N.E. at 1053. The effect of the *MacPherson* case was even more significant. The reasoning behind the opinion made it clear that by placing the car upon the market, the manufacturer had assumed a responsibility to the consumer which did not rest upon contract, but upon the relation arising from the purchase and foreseeability of harm resulting from lack of proper care. Since the seller's affirmative conduct may well affect the interests of others, the duty was said to be imposed by law. See *Prosser, op. cit. supra* note 2, at 661.
the rule was gradually enlarged to impose negligence liability upon a contractual supplier of any chattel.\textsuperscript{16}

\textbf{II. THE ADVENT AND EXPANSION OF STRICT LIABILITY}

The manufacturer and seller of products having been held liable to the ultimate consumer on the basis of negligence, it is not surprising that an attempt was made to extend their responsibility even further, to make them strictly liable for injuries caused by their products, even if they had exercised all reasonable care.

The assault on the "fortress of strict liability"\textsuperscript{17} began in the area of food and drink. Early American decisions imposed strict liability upon the seller of food for injuries arising after a direct sale to the injured consumer.\textsuperscript{18} The ultimate acceptance of strict liability in this area can be attributed to several coinciding factors: (1) the national concern over defective food and drugs, strengthened by the "muckrakers" who exploited certain heinous practices of the food industry; (2) the liberal "trust-busting" atmosphere of 1912 and the philosophy of protection of the people from big business; and (3) perhaps most of all, the natural concern of human beings with something affecting them so intimately.\textsuperscript{19}

As strict liability was gradually accepted in the area of food and drink, the rule was gradually extended into other areas. It was first extended to products intended for external rather than internal intimate bodily use.\textsuperscript{20} In 1960, Dean Prosser wrote of seven "spectacular decisions, which appear to have thrown the limitation to food onto the ashpile \textsuperscript{21} These decisions held the seller strictly liable to the ultimate user for the sale of any dangerous product even though the seller exercised all possible care, and no contractual relations existed between the seller and the user.\textsuperscript{22} Since 1960, other decisions, more spectacular perhaps, have not only confirmed the discard of the limitation of strict liability to food, but may soon cause the question to be reversed: is there any exception to the rule of strict liability? It is to this ultimate question that an examination of the recent decisions will be addressed.

\textsuperscript{16} Prosser, \textit{supra} note 1, at 1100-02.
\textsuperscript{17} \textit{Id.} at 1103.
\textsuperscript{18} \textit{Id.} at 1104 n.37
\textsuperscript{19} \textit{Id.} at 1104-06.
\textsuperscript{20} It was extended to apply to such products as hair dye, soap and cigarettes. \textit{PROSSER, op. cit. supra} note 2, at 676-77
\textsuperscript{21} Prosser, \textit{supra} note 1, at 1112.
\textsuperscript{22} \textit{Ibid.}
A. Spence and Beyond. An Awakening

In 1958, "the real bursting of the dam" in the area of strict tort liability began in Michigan with the decision in *Spence v. Three Rivers Builders & Masonry Supply, Inc.* This case held a manufacturer of defective cinder blocks strictly liable although his product was patently not intended for bodily use, was not inherently dangerous, and caused only property damage. Subsequent cases continued the trend by imposing strict liability for breach of warranty upon a manufacturer of electrical cable, a manufacturer of tires, a maker of a grinding wheel, a manufacturer of trucks, the manufacturer of an airplane, and finally a manufacturer of house trailers.

At first the imposition of strict tort liability was justified on the nebulous grounds of "public policy." Gradually, however, the courts began to invent theories, generally unsound, to support opinions applying the strict tort remedy. The theory of a "warranty" running with the goods from the manufacturer to the consumer was the most generally accepted. However, since warranty previously had become associated with contract in the thinking of most courts, the adoption of this theory led to many complications in imposing strict tort liability. Nevertheless, by 1960, some courts had overcome these complications and had succeeded in ex-

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23 LOSSER, op. cit. supra note 2, at 677.
24 353 Mich. 120, 90 N.W.2d 873 (1958).
31 PROSSER, op. cit. supra note 2, at 678.
32 *Ibid.* Some of the theories employed to circumvent a lack of privity between plaintiff and defendant were: (1) the fictitious agency of the intermediate party to purchase for the consumer; (2) the theoretical assignment of the seller's warranty to the immediate buyer; and (3) the third party beneficiary contract.
33 This theory was first enunciated in Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927). See PROSSER, op. cit. supra note 2, at 678.
34 Two such problems involve the giving of notice of breach of a warranty by the buyer to the seller and the possibility of disclaimer of warranties by the seller, both dealt with in the Uniform Sales Act and the Uniform Commercial Code. See Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes, and Communication Barriers*, 17 W RES. L. REV. 5 (1965).
tending strict liability for breach of warranty on non-consumer, commercial products even though only property damage, and not personal injury, was involved.

Several of the cases can easily be criticized in terms of logic and their analysis of prior law;\textsuperscript{35} but as an aggregate, they represent a breakthrough in the assault on the concepts of contract and privity in the area of products liability. These decisions, “spectacular” in 1960, were but the beginning of the emergence of a general rule of strict tort liability.

B. The Acceptance of Strict Tort Liability

(1) New York.—Post-1960 New York decisions provide an illustration of the tortuous evolution some courts have traversed in making the transition, under our system of case-by-case adjudication, from privity and the contract theory of warranty to strict tort liability. In 1961, a New York court in Greenberg v. Lorenz\textsuperscript{38} was confronted with a less than sensational fact situation. A child was injured when she bit into a piece of metal in some salmon purchased by her father. In imposing liability upon the retail food dealer, despite the lack of privity between the child and the dealer, the court carefully justified its decision in favor of the child, as well as the father, by reasoning that it would be manifestly unjust to deny a child damages because of non-privity. The court added that since the privity rule is itself of judicial making, “so convincing a showing of injustice and impracticality calls upon us to move; but we should be cautious and take one step at a time.”\textsuperscript{37} The fact that the child’s father, and not the child herself, purchased the food, the court continued, is not sufficient reason to dismiss her cause of action, particularly since today much food is sold in packages and goes beyond the individual buyer. Therefore, the court concluded, “at least as to food and household goods, the presumption should be that the purchase was made for all the members of the household.”\textsuperscript{38}

Thus in 1961, the “liberal” New York courts, while exhibiting a tendency towards expansion of strict tort liability, were proceeding cautiously indeed. Strict liability could be imposed as to “food and household goods,” a result previously reached and surpassed.

\textsuperscript{37} Id. at 200, 173 N.E.2d at 775-76, 213 N.Y.S.2d at 42.
\textsuperscript{38} Id. at 200, 173 N.E.2d at 776, 213 N.Y.S.2d at 42.
elsewhere. The reluctance to open the remedy of strict liability to a broad interpretation is emphasized by the concurring opinion in the Greenberg case, in which the necessity of privity as a general rule was emphasized. The concurring opinion viewed this particular case as an exception to the privity rule and maintained that the rule itself should be changed only by the legislature.

In Randy Knitwear, Inc. v American Cyanamid Co., New York advanced one step further. There, a remote purchaser brought an action for damage resulting from fabric shrinkage against a resin manufacturer and its licensees. The plaintiff had contracted for certain textile material which had been expressly warranted against shrinkage by the manufacturer of the resins with which the damaged material was treated. The court granted recovery, extending the Greenberg rationale to encompass modern merchandising and commercial practices — mass media advertising and representations on packages and labels. Recognizing that some courts had distinguished between injury to the person and injury to property, the court nevertheless rejected any such distinction by stating that "since the basis of liability turns not upon the character of the product but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or the type of article or goods involved." The language of the opinion, and particularly the dictum therein, was broad, with the court concluding that the "old court-made rule" should be modified to dispense with the privity requirement. Although the majority viewed this conclusion as no more than a fulfillment of "an historic and necessary function of the court" to make the law harmonious with "modern-day needs and with concepts of justice and fair dealing," a concurring opinion refused to dispense with the requirement of privity without limitation, caustically remarking that "we decide cases as they arise. . ." Thus, a reluctance to extend the strict tort remedy without limit was still discernible.

In 1963, the New York Court of Appeals issued its spectacular...

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39 See Prosser, op. cit. supra note 2, at 674-78.
42 Id. at 15, 181 N.E.2d at 404, 226 N.Y.S.2d at 370.
43 Ibid.
44 Ibid.
45 Ibid.
46 Id. at 16, 181 N.E.2d at 405, 226 N.Y.S.2d at 371.
decision in *Goldberg v. Kollsman Instrument Corp.* An administrator sued for damages for the death of her daughter, a fare-paying passenger, in a plane crash. The court held 4 to 3 that an airplane manufacturer's implied warranty of fitness of his product for its contemplated use runs in favor of all intended users, despite a lack of privity of contract. More significantly, the court made clear that a breach of warranty is not only a violation of the sales contract out of which the warranty arises, "but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer." 

Although *Greenberg,* *Randy Knitwear,* and other decisions prepared the way for this extension, they did not unambiguously recognize breach of warranty as a "tortious wrong" warranting the application of strict tort liability. The new outright recognition of strict tort in *Goldberg* was limited only to the extent that the manufacturer of a component part of the finished product was not held liable — at least for the present. It was felt that holding the airplane manufacturer liable would provide adequate protection for passengers.

(2) California.—The adoption of strict tort liability in California preceded the acceptance of that doctrine in New York. In *Greenman v. Yuba Power Prods., Inc.*, an action was brought in negligence and express warranty against the manufacturer and seller of a defective home workshop machine which caused injury to the plaintiff. The plaintiff failed to notify the manufacturer of the breach of the express warranty as required by the Uniform Sales Act. After distinguishing between the Sales Act warranties and the rules applicable in an action for personal injuries resulting from a defective product, the California Supreme Court held that the notice requirements of the Sales Act were inapplicable in an action against a manufacturer with whom the injured party had never

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48 *Id.* at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594. (Emphasis added.)
51 See discussion of the California cases, in the text accompanying notes 54-65 infra.
55 *UNIFORM SALES ACT* §§ 49, 69.
The court further distinguished strict tort liability from breach of warranty by stating:

"To impose strict liability on the manufacturer under the circumstances of this case, it was not necessary for plaintiff to establish an express warranty. A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

The abandonment of the requirement of a contract between them [the manufacturer and the plaintiff], the recognition that the liability is not assumed by agreement but imposed by law and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."**

This unequivocal recognition of the doctrine of strict liability in California was not as surprising as it might have been elsewhere since in the 1944 decision of *Escola v Coca Cola Bottling Co.*, Judge Traynor, who wrote the opinion in the *Greenman* case, had written a landmark concurring opinion, in which he advocated holding a manufacturer strictly liable for injuries resulting from defective articles which the manufacturer placed in the stream of commerce. He reasoned then that the imposition of strict tort liability was justified by considerations of public policy as well as by the fact that the manufacturer was in a better position to bear any risk involved. Almost two decades later, in *Greenman*, his view became the law of California.

Most of the questions left unanswered in *Greenman* were disposed of two years later in *Vandermark v. Ford Motor Co.* Vandermark made clear that the requirement of timely notice was inapplicable to tort liability and that the dealer's attempted disclaimer of liability was ineffectual, since he was held strictly liable in tort, thus

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58 *Id.* at 461, 150 P.2d at 440. Interestingly, Judge Traynor actually used the words "absolute liability" and not "strict liability" in his opinion in *Escola*. Since he indicated that the product must have a defect, however, he obviously intended what is generally referred to now as "strict" liability. See discussion in text accompanying notes 109-13 infra. However, he used the term "strict liability" in *Greenman*.
59 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rep. 896 (1964). *Vandermark* was not without precedent, since a similar conclusion was reached in a similar fact situation in the famous *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). *Henningsen* was decided under the Uniform Sales Act, but the court utilized the Uniform Commercial Code concept of unconscionability. See Shanker, *supra* note 34, at 29.
rendering contractual restriction of liability immaterial. Also, *Greenman* was extended to retailers "engaged in the business of distributing goods to the public," on the theory that retailers are an "integral part" of the "overall marketing enterprise," and should share with manufacturers the cost of injuries resulting from defective products. The court also noted that holding the retailer strictly liable should contribute to safety and afford maximum protection to injured parties. The court justified its conclusion by reasoning that the retailer and manufacturer may adjust costs in their commercial dealings. The court rejected defendant manufacturer's contention that it should not be held liable unless plaintiff proved that no part of the automobile had been changed during the interval between its departure from Ford's control and the ultimate sale to the plaintiff. In indicating that strict liability encompasses defects "regardless of their source," the court stressed that the fact that a defective part is supplied by another or connected with others in the chain of distribution will not obviate the manufacturer's liability for the completed product. Thus, with the *Vandermark* decision, California rejected the contractual and negligence concepts surrounding warranty, choosing to embrace strict tort liability with its necessary concomitants.

Interestingly, a later 1964 California case, *Seely v. White Motor Co.*, refused to impose strict liability for property damage, finding that an analysis of the *Greenman* and *Vandermark* cases precluded such a result. The court emphasized the numerous references in these decisions to personal injury and stated that at this time the doctrine of strict liability in California is limited to that type of injury.

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60 *Vandermark* v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rep. 896 (1964). The court stated its position concerning the dealer's disclaimer: "regardless of the obligations it assumed by contract, it is subject to strict liability in tort because it is in the business of selling automobiles, one of which proved to be defective and caused injury to human beings." *Id.* at 263, 391 P.2d at 172, 37 Cal. Rep. at 900.

61 *Id.* at 262, 391 P.2d at 171, 37 Cal. Rep. at 899.


65 *Id.* at 811. The *Seely* court was not alone in its reluctance to impose strict liability upon a manufacturer when injury to property alone is alleged. *Ibid.*
(3) Other jurisdictions.—Two recent cases illustrate the current trend toward the adoption of strict tort liability in other jurisdictions. In *Putman v. Erie City Mfg. Co.*, a federal court applying Texas substantive law held both the manufacturer of a fork stem connecting a wheel to a wheelchair and the assembler of the wheelchair strictly liable to the plaintiff who rented the chair from a retail druggist — the purchaser — and who was injured when a wheel came off because of a defect in the fork system. In finding liability, the court stated that this product, if defective, was as unreasonably dangerous to the user as harmful food products. It reached this conclusion even though (1) the product was not for human consumption, (2) there was no proof of negligence, and (3) there was no privity between the user and manufacturer or assembler. Citing several of the cases previously discussed, as well as Texas case law, the court pointed out that the privity requirement in Texas had been greatly relaxed, and that public policy necessitated the imposition of liability through operation of law upon the party who placed an unreasonably dangerous product in the stream of commerce. The court concluded by emphasizing that the imposition of strict liability was appropriate "as to any product that has a defect unreasonably dangerous enough to cause harm to its user."

v. *Borden Chem. Corp.*, 233 F. Supp. 53 (E.D. Pa. 1964), a subpurchaser of an adhesive claimed that the product failed to hold glass in his window frames, requiring him to reglaze thousands of window panes at great expense. The Pennsylvania federal court refused to grant recovery for breach of warranty in the absence of privity between plaintiff and defendant, claiming that the defense of privity had not been vanquished in Pennsylvania law when the cause of action is based upon an implied warranty and when the "damages sustained are solely property damages or commercial losses without personal injury." *Id.* at 55.

In stating that the rule of privity was not defunct in Pennsylvania, the court referred to *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), where the Pennsylvania Supreme Court denied recovery to an employee who had been injured by an exploding bottle, since he was "a complete stranger to any contract transaction involved" and did not fall within the express statutory exceptions of § 2-318 of the Uniform Commercial Code (enacted in Pennsylvania). *Id.* at 614, 187 A.2d at 578. "To grant such an extension of the warranty, as urged herein, would in effect render the manufacturer a guarantor of his product and impose liability on all such accident cases even if the utmost degree of care were exercised. This would lead to harsh and unjust results." *Ibid.* It should be noted, however, that the impact of the *Hochgertel* case has been mitigated by *Yentzer v. Taylor Wine Co.*, 414 Pa. 272, 199 A.2d 463 (1964), noted in 14 CATHOLIC U.L. REV. 133 (1965), which extended a seller's implied warranty to include an employee of the purchaser. In *Yentzer*, the employee made the purchase himself, whereas in *Hochgertel* the employer was the buyer. Thus, while the *Hochgertel* decision was officially reaffirmed, its effect was avoided by a seemingly meaningless distinction.

*66* *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964); *Lonzrick v. Republic Steel Corp.*, 1 Ohio App. 2d 374, 205 N.E.2d 92, *motion to certify granted, 38 OHIO BAR 700 (June 23, 1965) (No. 39493).

*67* 338 F.2d 911 (5th Cir. 1964).
Man does not live by bread alone.\textsuperscript{68} Whether the Putman court intended its decision to encompass both personal injury and property damage is not entirely clear, but it is clear that the court would impose strict liability regardless of the type of product involved. However, despite the many broad statements in the opinion, it should be emphasized that the nature of the product, a wheelchair, was such as to make the holding predictable and reasonable, and the court itself stressed this factor.\textsuperscript{69}

In the second recent case, Lonzrick v. Republic Steel Corp.,\textsuperscript{70} the product involved was "steel bar joists" — a commercial, rather than a consumer, product. The plaintiff was a construction worker employed by a sub-contractor. The joists were purchased from the defendant by the general contractor. Although the plaintiff could in no way be considered a consumer, the court held the manufacturer liable in an action for personal injuries based on a breach of the duty imposed by law to furnish merchantable joists to the general contractor. The court also found an obvious lack of privity irrelevant since the remedy sought was strict tort liability. Relying upon Greenman,\textsuperscript{71} Randy Knitwear,\textsuperscript{72} Vandermark,\textsuperscript{73} other recent decisions, and public policy, the court concluded that the manufacturer's obligation to market a merchantable product is created by law and "has no dependence whatever on the contractual relations between the parties."\textsuperscript{74}

The Lonzrick court indicated three methods by which one suffering injury or damage due to a defective chattel delivered by the manufacturer or vendor might seek redress against the manufacturer. First, where the ultimate purchaser stands in a contractual relation to the producer or vendor, an action (if justified by the facts) for breach of express or implied warranty may be

\textsuperscript{68} Id. at 923. The court also discussed various drafts of section 402 A of the Restatement (Second), Torts (1965) in detail, which will be discussed infra.

\textsuperscript{69} Putman v. Erie City Mfg. Co., 338 F.2d 911, 915 (5th Cir. 1964).

\textsuperscript{70} 1 Ohio App. 2d 374, 205 N.E.2d 92, motion to certify granted, 38 Ohio Bar 700 (June 23, 1965) (No. 39493).


\textsuperscript{74} Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 377, 205 N.E.2d 92, 95, motion to certify granted, 38 Ohio Bar 700 (June 23, 1965) (No. 39493).
maintained as provided by the Uniform Commercial Code.\textsuperscript{75} Second, an action may be brought for negligence, as in the MacPherson v. Buick Motor Co.\textsuperscript{76} case, regardless of privity.\textsuperscript{77} Third, an action may be brought to enforce strict tort liability without privity.\textsuperscript{78} The court appears to suggest that these remedies are available alternatively, depending on the particular fact situation, provided only that the theory advanced by plaintiff is clearly and correctly pleaded. The court also indicated that since "warranty" in actuality means no more than a representation by the manufacturer that his goods are of merchantable quality (an obligation imposed by law which describes a cause of action for strict liability), the manufacturer may not define the scope of his own responsibility for defective products, since the liability is not one governed by the law of contract warranties, but by the law of strict liability in tort.\textsuperscript{79}

(4) Restatement Second, Torts.—The ascendancy of the strict tort doctrine in the area of products liability has received a definite impetus from the Restatement of Torts, Second.\textsuperscript{80} In contrast to the original Restatement, which contained no provision for strict liability based on a seller's warranty, the 1961 draft of section 402 A provided for the seller's strict liability, but limited it to claims for "food for human consumption."\textsuperscript{81} One year later, the next tentative draft\textsuperscript{82} expanded coverage to include "products intended for intimate bodily use," whether or not they have any nutritional value.\textsuperscript{83} Finally, in May, 1964, the last tentative draft of section 402 A\textsuperscript{84} extended coverage to include all products.\textsuperscript{85} The only limitation im-

\textsuperscript{75} Id. at 383, 205 N.E.2d at 98. It would appear that this view severely limits the role of the Uniform Commercial Code to those in privity of contract and the accuracy of this view is indeed questionable. For a discussion of the relationship of the Uniform Commercial Code to developing case law, see Shanker, supra note 34.

\textsuperscript{76} 217 N.Y. 382, 111 N.E. 1050 (1916).

\textsuperscript{77} Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 383, 205 N.E.2d 92, 98, motion to certify granted, 38 Ohio BAR 700 (June 23, 1965) (No. 39493).

\textsuperscript{78} Ibid.

\textsuperscript{79} Ibid.

\textsuperscript{80} This Draft has been relied upon increasingly in the most recent decisions. See, e.g., Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964), where the court analyzed the evolution of the various drafts of § 402 A from the original RESTATEMENT to the last tentative draft in May, 1964.

\textsuperscript{81} RESTATEMENT (SECOND), TORTS § 402 A (Tent. Draft No. 6, 1961).

\textsuperscript{82} RESTATEMENT (SECOND), TORTS § 402 A (Tent. Draft No. 7, 1962).

\textsuperscript{83} Ibid.

\textsuperscript{84} RESTATEMENT (SECOND), TORTS § 402 A (Tent. Draft No. 10, 1964) (now official version).

\textsuperscript{85} § 402 A Special Liability of Seller of Product to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for
posed therein is that the product must be defective and unreasonably dangerous at the time of sale. There is no limitation upon the type of product involved, nor upon the type of harm inflicted, since section 402A explicitly includes the terms "any product" and "physical harm" to the user or consumer "or to his property." 86

III. EXISTING LIMITATIONS ON STRICT TORT LIABILITY

While some courts still hesitate to impose strict tort liability upon manufacturers and sellers other than in the area of food products, 87 it is now apparent that those which recognize the remedy are beginning to apply it with few restrictions. Not one of the recent cases discussed refused to impose strict liability because of the type of product involved. On the other hand, there has been some reluctance to impose liability when only injury to property, and not to person, has been incurred. For example, in Greenman v. Yuba Power Prods., Inc. 88 and Vandermark v. Ford Motor Co., 89 the courts repeatedly referred to strict liability in terms of defects which cause personal injury to human beings. 90 The court in Seeley v. White Motor Co. 91 borrowed the same language in justifying its conclusion that strict liability, in California, could be imposed only in the case of personal injuries. A federal court applying Pennsylvania law 92 echoed this conclusion, drawing a pointed distinction between damages sustained to property and personal injury. It is true, however, that several courts have unequivocally denounced any such

86 Ibid.
90 See discussion in text accompanying notes 54-63 supra.
distinction. In *Randy Knitwear Inc. v. American Cyanamid Co.* although the injury involved fabric shrinkage resulting in material loss, and not personal harm, the court rejected any distinction either on the basis of the type of injury suffered or the type of product involved, stating that the liability of the manufacturer turns upon the representation alone.

If some reluctance still exists to impose liability where property damage alone has been incurred, it is reasonable to predict that this limitation will also fall by the wayside in the continuing "assault" upon the fortress of strict liability. Authorities in the field of torts reject any distinction between injury to property and injury to person, and the Restatement of Torts, Second imposes strict liability for the manufacture of any product which causes injury to the person and to property. These two forces will undoubtedly prove influential in the future. Furthermore, the language in recent leading opinions that seems to limit liability to injury to human beings is easily subject to a different interpretation. It is logical to believe that such language was employed merely because personal injury constituted the only claim then before the court. In the not too distant future, then, strict liability without limitation may be expected as the law of the land.

IV. SHOULD ANY LIMITATIONS BE IMPOSED?

It is now apparent that strict liability without limitation may be expected in every jurisdiction. One question remains: are there

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95 *Id.* at 9, 181 N.E.2d at 404, 226 N.Y.S.2d at 368. This case did involve an express warranty and the court emphasized the representations made by the defendant through advertisements.


97 These same authors have already rejected any distinction between the types of products involved. See note 96 supra.

any valid reasons for imposing any limitations upon strict tort liability? An examination of the policy considerations underlying the imposition of this remedy is essential in constructing an answer.

Of the many arguments advanced in support of strict liability, it has been pointed out that the courts have generally accepted or relied on only three. First, public interest in the protection of human life and safety necessitates a maximum degree of protection against dangerous products which consumers must buy and against which they are unable to protect themselves. Such helplessness justifies the imposition of responsibility on the suppliers of the products for harm incurred, even if all possible care has been exercised. Second, since the manufacturer places his products on the market and represents to the public that they are safe for use, often attempting to encourage such belief by packaging and advertising, he must expect his product to be purchased and used in reliance upon his representations; therefore, he should not be allowed to avoid or limit his responsibility. Third, the ultimate result of strict liability has already been attainable by a series of actions that are time-consuming and expensive and may be halted by insolvency, or lack of jurisdiction. For these practical reasons, then, strict liability in tort should be recognized unequivocally.

Clearly, the last two arguments apply equally to any product or injury. While the public interest in human protection is not as relevant to products not intended for bodily use, it is nevertheless true that the suppliers of all products are in a position to insure maximum protection to ultimate users, regardless of the nature of the product, and therefore should bear this responsibility. It is still tempting, however, to offer a distinction between commercial and consumer goods. The line between the two types of products is sometimes close and problems of definition would be a likely result.

99 Prosser, supra note 96, at 1119-22.
100 Id. at 1122. Prosser comments that this argument rests essentially upon "public sentiment" and had greatest impact in the area of food, where public indignation has been most apparent. It is, however, now being advanced as to other products, such as automobiles. Ibid.
101 Id. at 1123. Further, the middleman is "no more than a conduit, a mere mechanical device," through whom the product sold reaches the eventual user. Since the supplier has sought use of his product, he cannot avoid responsibility if its use results in harm by saying that he has no contract with the user. Ibid.
102 Although the retailer is first held liable on a warranty to the purchaser, indemnity is usually sought from other suppliers, with the manufacturer ultimately paying the damages plus the cost of repeated litigation. Ibid.
103 Id. at 1124.
One answer, however, may be an agreement among the commercial parties defining terms satisfactory to all. But there are positive reasons to make such a distinction: to encourage manufacturers to experiment in new commercial products and to allow others to assume the risk of such experimentation.

In arguing against distinguishing between types of injuries incurred, it has been said that a tort is a tort, regardless of the type of injury that results, and that it would be manifestly unjust to grant relief for a minor personal injury while denying it for a major injury to property, each ensuing from the same tort. It has also been said that such arguments perhaps overlook one factor: that the doctrine imposing strict tort liability upon the manufacturer and seller of goods rests primarily on social and economic policy — the wish to allocate certain basic risks to those best able to bear them. This policy might be less persuasive when considered in relation to property damage rather than to personal injury. This latter "reasoning" is unpersuasive.

No satisfactory rationale has been presented for distinguishing between the two types of injury, although some courts have exerted much mental effort in attempting to do so. When strict liability was limited to products intended for bodily use, recovery was necessarily restricted to personal injury alone. With the application of strict liability without regard to the type of product involved and the fact that some products are more likely to cause property damage

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106 In *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion), Judge Traynor stated: In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect which causes injury to human beings. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences.

than personal injury, there is no logical reason for distinguishing between the types of injury incurred.\textsuperscript{108}

Once strict liability is accepted as the law of the land, as there is every indication that it will be in the not too distant future, it will be applied without limitation to specific classes of products or injuries. Any reluctance present in the courts at this time will be overcome, as the doctrine of strict liability is carried to its logical conclusion.

V THE MANUFACTURE AND SELLER — WHAT REMAINS?

Once strict liability without limitation is accepted as the law of the land, manufacturers and sellers will undoubtedly bemoan their fate. They will doubtless construe this new remedy to imply liability regardless of what positive actions they may take, and fear that no defenses remain to them. This is not true. Strict liability is not an absolute liability.\textsuperscript{109} In strict liability, it is essential to show that the product is defective. In other words, mere suffering of injury from a product, whether defective or not, is not sufficient to gain access to this remedy. In contrast, the “absolute liability” applied to users of such things as explosives permits recovery from the user for injuries even though the product is totally non-defective.\textsuperscript{110}

There are also certain defenses to strict liability. The Restatement of Torts, Second recognizes assumption of the risk as a defense.\textsuperscript{111} A recent case, Greeno v. Clark Equip. Co.,\textsuperscript{112} recognizes “misuse” as a defense, stating that although contributory negligence is not a defense to strict torts liability, “use different from or more strenuous than that contemplated to be safe by ordinary users/consumers, that is, “misuse,” would either refute a defective condition or causation,”\textsuperscript{113} both of which are essential to recovery. Misuse would often include conduct that might be considered contributory negligence, the court explained, adding that assumption of the risk,

\textsuperscript{108} Thus the Restatement (Second), Torts § 402 A (1965), which imposes strict liability regardless of the type of product involved, logically extends recovery to both personal and property damages.
\textsuperscript{109} See Lascher, supra note 96, at 47
\textsuperscript{110} ibid.
\textsuperscript{111} Restatement (Second), Torts § 402 A, comment n (1965)
\textsuperscript{112} 237 F. Supp. 427 (N.D. Ind. 1965)
\textsuperscript{113} Id. at 429.
as made clear in the Restatement, was also a good defense. Thus, there can be no doubt that assumption of the risk will be a valid defense, and that in all probability other courts will follow the Greeno court in recognizing "misuse" as well.

IV CONCLUSION

The revolutionary development of strict tort liability as a remedy for the manufacture and sale of defective goods has swept our land. The limitations presently in existence upon this remedy are few and in all probability these too will be discarded as the rush toward strict tort liability continues.

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